U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 07 July 2006

CASE NO.: 2005-SOX-00106

In the Matter of:

P. J. DI GIAMMARINO,
Complainant,

v.

BARCLAYS CAPITAL, INC., BARCLAYS PLC,
RICHARD T. RICCI, and ROBERT E. DIAMOND, JR.,
Respondents.

RECOMMENDED FINAL ORDER OF DISMISSAL

An Order to Show Cause, which was issued in the above-captioned matter on May 25, 2006, directed the parties to either submit a settlement agreement in this matter for approval within thirty days or, if they failed to do so, show cause why this case should not be dismissed for lack of jurisdiction. Although more than thirty-five days have elapsed, allowing thirty days for a response and five days for mailing under 29 C.F.R. §§ 18.6 and 18.10, there has been no response to the Show Cause Order. Accordingly, this matter will be dismissed.

Background

The instant case was brought by Complainant P. J. Di Giammarino under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act of 2002 (the "Act"), 18 U.S.C. §1514A, with implementing regulations appearing at 29 C.F.R Part 1980. In his June 29, 2005 complaint, Mr. Di Giammarino ("Complainant") asserted that his employment was terminated because he engaged in protected activities. From early 2003 until his termination in early 2005, Complainant was employed by Barclays Capital Services Limited, a United Kingdom company. The complaint named two other entities as respondents, based upon their relationship with Barclays Capital Services, Limited: (1) Barclays Bank, PLC, a financial services group with headquarters in London and (2) Barclays Capital, Inc., the United States branch of Barclays Bank PLC. Complainant was employed in the United Kingdom and resided there during the entire course of his employment. Although he has asserted that he was really an employee of the U.S. entity (Barclays Capital, Inc.), his entire basis for claiming that is his assertion that the entity that employed him was merely an "accounting vehicle" for Barclays Capital, the investment banking division of Barclays Bank PLC. Complainant has dual citizenship as an American citizen and an Italian citizen.

In a determination letter of July 28, 2005, the Occupational Safety and Health Administration (OSHA) determined that it lacked jurisdiction under the Act because, although Complainant is a citizen of the United States, he worked in Respondents' London offices and he was discharged in London. In an appeal letter of August 26, 2005, Complainant, through counsel appealed that determination and requested a full hearing on the merits of the claim.

On September 9, 2005, the undersigned issued a Notice of Assignment and Order which directed that, within thirty (30) days, the parties state their positions on the preliminary issue of whether this tribunal had jurisdiction under the Sarbanes-Oxley Act and also indicate whether a formal hearing would be required for resolution of this preliminary issue. In responses of October 11, 2005, Complainant asserted that this tribunal had jurisdiction while Respondent asserted the contrary. Thereafter, the parties discussed supplemental authority, including the decision by the Court of Appeals for the First Circuit in *Carnero v. Boston Scientific Corp.,* 433 F.3d 1 (1st Cir. 2006), *cert. denied* No. 05-1397, – U.S. – (June 26, 2006).

On May 8, 2006, Complainant, through counsel, sought to withdraw his hearing request in the instant case. By letter of May 8, 2006, counsel for Complainant asserted that his client "has recently resolved all of his disputes with the respondents" and stated that "[w]e hereby withdraw Mr. Di Giammarino's request for a hearing and request that the proceeding be dismissed." Counsel further stated that "Mr. Di Giammarino is satisfied that respondents did not unlawfully retaliate against him." Any opposition to Complainant's request would have had to be filed by no later than May 23, 2006. No opposition was filed.

Because it was unclear from Complainant's correspondence whether a settlement was involved, the undersigned had her legal technician contact Complainant's counsel, who advised that a settlement was, in fact, involved. Accordingly, by the Order to Show Cause of May 25, 2006, the parties were ordered to either submit the settlement for approval or show cause (if there was any) why this case should not be dismissed for lack of jurisdiction. No response has been filed by either party.

Discussion.

As noted in the Show Cause Order, section 1980.111(c) and (d) (2) of title 29, C.F.R. provides in relevant part:

> (c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the [Administrative Review] Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section. [Emphasis added]
>
> (d)(1)***

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement will be filed with the administrative law judge or the Board, as the case may be. [Emphasis added]

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, will constitute the final order of the Secretary and may be enforced pursuant to § 1980.113.

Based upon this provision, the Show Cause Order found the withdrawal provision to be inapplicable here. Therefore, the parties were essentially given the choice of submitting the settlement for approval or having the jurisdictional issue adjudicated.

Under the decision of the Administrative Review Board in *Concone v. Capital One Financial Corporation,* ARB No. 05-038, ALJ No. 2005-SOX-6 (2005), the parties were given the option of submitting a settlement for approval or withdrawing the hearing request. In *Concone*, an administrative law judge dismissed a complaint for lack of jurisdiction because the complainant was employed outside of the United States. When this matter was pending on appeal before the ARB, the parties submitted a Joint Stipulation of Dismissal indicating that the parties agreed to dismiss the action with prejudice. The Board issued an Order Requiring Clarification, noting that the parties had two options once a party has filed objections to the findings or preliminary order: (1) a party may withdraw his or her objections to the findings or order by filing a written withdrawal of objections and (2) the parties may settle the case if they enter into a settlement and the settlement is approved. The parties withdrew the stipulation for dismissal and the complainant withdrew the objections, and the case was dismissed by the Board.

Inasmuch as the parties have not submitted a settlement, the issue before me is whether this matter should be dismissed for lack of jurisdiction. Here, in its July 28, 2005 determination letter, OSHA determined that it lacked jurisdiction under the Act because, although Complainant is a citizen of the United States, he worked in Respondents' London offices and he was discharged in London. By Complainant's withdrawing his objection to OSHA's findings, the findings became final. Moreover, dismissal of the case on jurisdictional grounds is consistent with the decision by the Court of Appeals for the First Circuit in *Carnero v. Boston Scientific Corp*., *supra,* which found the whistleblower provisions of the Sarbanes-Oxley Act inapplicable to the extraterritorial situation involved in that case. While in footnote 17, the First Circuit left open the possibility that there might be situations in which the Act might be applicable in a foreign venue, such as where an employee based in the United States is retaliated against for whistleblowing while on a temporary assignment overseas, there do not appear to be sufficient special circumstances in the instant case that would give rise to jurisdiction. Here, the employee worked exclusively in the United Kingdom for a division of Barclays PLC based in the United Kingdom. Accordingly, this matter should be dismissed for lack of jurisdiction under the Act.

ORDER

IT IS HEREBY ORDERED, that the instant case be, and hereby is **DISMISSED** for lack of jurisdiction.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).